U.S. Department of Justice

Federal Bureau of Investigation

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Washington, D.C. 20535

July 8, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

RE: In the Matter of)
Rules and Policies on Foreign)
Participation in the U.S.)
Telecommunications Market)

IB Docket 97-142

Dear Mr. Caton:

Enclosed please find an original and five copies of the Comments of the Federal Bureau of Investigation in IB Docket No. 97-142, for filing therein. Please date-stamp one of the copies and return it to our courier.

Sincerely,

John F. Lewis, Jr.
Assistant Director in Charge
National Security Division

cc: Dougals A. Klein
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JUL - 9 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of	)	
	)	
Rules and Policies on Foreign Participation in the U.S. Telecommunications Market	)))	IB Docket No. 97-142

COMMENTS OF THE FEDERAL BUREAU OF INVESTIGATION

These Comments, submitted by the Federal Bureau of Investigation (the "FBI"), concern an Order and Proposed Notice of Rulemaking issued by the Federal Communications Commission (the "Commission"), captioned "In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market" (IB Docket No. 97-142) and dated June 4, 1997 (the "June 4, 1997 NPRM" or the "NPRM"). The June 4, 1997 NPRM would purport to require federal agencies with national security and/or law enforcement concerns about a particular foreign-affiliated common carrier radio license application to overcome a "strong presumption" against denial of a license, if the applicant is based in a World Trade Organization ("WTO") member country. For reasons discussed below in Point I, the FBI strongly objects to this proposed new "strong presumption" standard and urges the Commission not to adopt it.

In Point II, the FBI responds to the NPRM's request for comments on whether the Commission "need[s] to review an increase in foreign ownership by a licensee that already has more than 25 percent foreign ownership." We believe the Commission does need to review such increases, for reasons explained below.

DISCUSSION

I. The Commission Must Defer to Executive Branch Agencies' Determinations That a Common Carrier License Should be Denied, Revoked, or Conditioned for National Security or Law Enforcement Reasons

A. Pertinent Provisions of the Communications Act of 1934

Congress has charged the Commission with regulating wire and radio communications for, among other objectives, "the purpose of the national defense" and "the purpose of promoting safety of life and property through the use of wire and radio communication." 47 U.S.C. § 151. These purposes have been fundamental to the Commission since § 151 was enacted in 1934 and were retained in § 151 by Congress when it amended that section in 1996.

To ensure that the communications laws and the Commission's authority under them are implemented to advance U.S. national security and the public safety of Americans, as contemplated in § 151, Congress has adopted additional measures. Most notably for purposes of the NPRM, under § 310 of the Communications Act of 1934 (47 U.S.C. § 310), Congress established special rules concerning foreign ownership of common carrier radio licenses, inter alia. Section 310 flatly prohibits aliens, foreign governments, and foreign corporations -- individually or through representatives -- from acquiring or holding such licenses. 47 U.S.C. §§ 310(a), (b)(1), and (b)(2). The section also denies such licenses to any corporation of which more than 20% of the stock is owned or voted by aliens, foreign governments, foreign corporations, or representatives of any of the three. 47 U.S.C.

§ 310(b)(3). And the section requires the Commission to refuse or revoke such a license when more than 25% of the stock of the parent of a prospective or actual licensee is controlled by aliens, foreign governments, foreign corporations, or representatives of any of the three, "if the Commission finds that the public interest will be served by the refusal or revocation." 47 U.S.C § 310(b)(4).

Thus, § 310 evinces a recognition by Congress that special concerns are presented by foreign ownership or control of, or influence over, common carrier radio licenses, concerns that are not presented when a license is held by a U.S. citizen or entity. As the Commission is aware, such concerns are shared within the Executive Branch. For example, FBI Director Louis Freeh and DEA Administrator Constantine, in a May 24, 1995 letter to Representative John D. Dingell (the "Freeh letter") (copy attached at Tab A), noted that the risks presented by foreign acquisitions of U.S. telecommunications licensees include:

- foreign-power sponsored interceptions of U.S. communications for intelligence purposes;
- compromise of U.S. Government efforts to conduct electronic surveillance for law enforcement or national security purposes against foreign targets associated with the home country of a foreign-owned telecommunications carrier;
- exposure, to the home government of the foreign-owned carrier, of sensitive governmental and private sector information maintained in common carrier records, databases, and central office facilities;
- exposure of intercept capabilities and vulnerabilities of U.S. law enforcement and intelligence agencies; and

- compromise of the National Security Emergency Preparedness functions all U.S. telecommunications licensees are expected to perform in the event of a national emergency.

B. The Commission's Existing Framework for Applying the § 310(b)(4) Public Interest Test

Fortunately, the Commission's public interest review under § 310(b)(4) has provided a mechanism that enables Executive Branch agencies to address these concerns and advise the Commission as to whether a license should be denied, revoked, or subjected to conditions for national security or law enforcement reasons. The framework for this mechanism was described in a November 1995 Commission Order,[1] where the Commission noted that it "will consider . . . public interest factors that weigh in favor of, or against, foreign investments subject to Section 310(b)(4)," and identified national security and law enforcement concerns as among these "factors." November 1995 Order, ¶ 216. The Commission elaborated on this framework as follows:

> We also recognize, however, that other federal agencies have developed specific expertise in matters that may be relevant in particular cases, such as international trade, national security, law enforcement, and foreign policy. . . . Our goal is to complement and support Executive Branch policies in these areas and, therefore, we will coordinate with appropriate executive agencies to make sure that our actions are consistent with national policy. <u>Accordingly, in making our public interest determination, we will accord deference to the views of the Executive Branch on any national security, law enforcement, foreign policy, or trade policy concerns, or the interpretation of international agreements.</u>

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[1] Market Entry and Regulation of Foreign-Affiliated entities, <u>Report and Order</u>, 11 FCC Rcd 3873 (1995) (the "November 1995 Order").

Id., ¶ 219 (emphasis added) (footnote omitted).[2] The Commission added: "In order to facilitate input from the Executive Branch, the Commission will alert appropriate executive agencies whenever an applicant seeks to exceed the statutory benchmark" set forth in § 310(b)(4). Id., ¶ 219, n. 288. The Commission has followed through on this commitment, and § 310(b)(4) applications have been vetted through executive agencies with expertise on national security, law enforcement, foreign policy, and trade policy, thereby ensuring that telecommunications policy is harmonized with these other important equities.

As this passage from the November 1995 Order reflects, the Commission, under the § 310(b)(4) public interest test, "accord[s] deference" to federal agencies with "specific expertise" on national security or law enforcement. The meaning of this language was elaborated further in an April 24, 1996 letter from Scott Blake Harris, then-Chief of the Commission's International Bureau, to Associate Deputy Attorney General Michael Vatis (the "Harris letter"). In his letter (copy attached at Tab B), Mr. Harris asserted that the Commission "will defer to the Executive Branch should it be advised that an applicant poses a law enforcement or national security problem" and that the public interest test "mandates we defer to the

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[2] The Commission has utilized this same approach in the context of applications processed under 47 U.S.C. § 214. See, e.g., November 1995 Order, ¶ 38. For ease of analysis, these Comments focus on the public interest test as applied under § 310(b)(4). However, our analysis and conclusions concerning § 310(b)(4) apply equally to § 214.

Executive Branch on these issues." "Indeed," Mr. Harris added, "it is inconceivable that the FCC would issue a license to an entity that it has been advised by the Executive Branch would pose a law enforcement or national security risk."

Accordingly, prior to June 4, 1997, the Commission, consistent with longstanding practice, had noted it would "accord deference" to executive agencies' national security and law enforcement "expertise" in applying the § 310(b)(4) public interest standard, and that such deference would make it "inconceivable that the FCC would issue a license to an entity" after being advised that granting the license would pose a law enforcement or national security risk. This approach leaves primary responsibility for national security and law enforcement issues with the agencies with expertise on and responsibility for those areas. It also prevents § 310(b)(4) from becoming a vehicle by which applicants and licensees with foreign links can routinely evade the flat prohibitions set forth elsewhere in § 310, which would frustrate the Congressional intent that presumably underlies those provisions.

C. The New Approach Offered by the June 4, 1997 NPRM

The June 4, 1997 NPRM is inconsistent with both the November 1995 Order and the Harris letter. In place of the existing framework, the NPRM would substitute the following, with respect to any prospective § 310(b)(4) common carrier licensee with a home market in a WTO member country:

> [T]here would be a strong presumption that denial of the application would not serve the public interest.

> We would, of course, continue to consider public interest factors in determining whether to grant or deny a common carrier application under Section 310(b)(4), including any national security, law enforcement, foreign policy, or trade concerns brought to our attention by the Executive Branch. . . . We do not anticipate that we would easily be persuaded that the public interest would be served by denying a license based on Section 310(b)(4) concerns, absent serious concerns raised by the Executive Branch.

June 4, 1997 NPRM, ¶¶ 74-75. See also id., ¶ 10 (proposing that the Commission should grant such applications unless it has been convinced there is "compelling evidence" dictating otherwise). Under this new framework, instead of according deference to Executive Branch judgments on national security and law enforcement, and notwithstanding executive agencies' expertise in these areas, the Commission would require the Executive Branch to overcome a "strong presumption" (by offering evidence the Commission finds "compelling") against denying any § 310(b)(4) application on national security or law enforcement grounds, if the applicant is based in a WTO country.

No justification for this proposed dramatic departure from current regulatory practice is offered in the June 4, 1997 NPRM. Indeed, nowhere in the NPRM does the Commission even acknowledge that the NPRM would alter the way the Commission has historically evaluated the national security and law enforcement components of the § 310(b)(4) public interest test.

Instead, the NPRM's analysis focuses on the Commission's intentions concerning the role of "effective competitive opportunities" ("ECO") analysis in applying the public interest standard. First adopted in the Commission's November 1995 Order, the ECO test, which concerns trade policy (not national security or law enforcement) is a relative newcomer to the group of factors assessed under § 310(b)(4). The NPRM proposes that the ECO test not be included as part of the § 310(b)(4) analysis whenever the common carrier license applicant has its home market in a WTO country. To support this proposal, the NPRM notes that on February 15, 1997, the United States and certain foreign governments that are WTO members entered into an agreement (the "GBT Agreement") to liberalize their respective basic telecommunications services markets. The NPRM reasons that the GBT Agreement, read together with the General Agreement on Trade in Services (the "GATS"), renders the ECO test unnecessary for prospective telecommunications common carrier licensees based in WTO countries. June 4, 1997 NPRM, ¶¶ 1-11, 28-47, 67-76.

The FBI takes no position concerning the NPRM's assessment that the GBT Agreement made it appropriate for the Commission to revisit the trade policy features of the November 1995 Order. Nor do we take any position concerning the Commission's proposed abandonment of the ECO test for applicants based in WTO member countries. However, as demonstrated above, the NPRM would stray well beyond the arena of trade policy by drastically reconfiguring the way the Commission considers the national security and law enforcement components of § 310(b)(4) public interest analysis. As explained above in Point I(A), elaborated upon in the Freeh letter, and heretofore acknowledged by the Commission, the gravity and complexity of the national security and law enforcement concerns presented by foreign ownership or control of common carrier radio licenses cannot be accommodated by the approach suggested by the NPRM.

It is neither feasible nor consistent with the purpose and structure of the Communications Act for an agency such as the FBI to be obliged to convince the Commission -- by way of "evidence" the Commission finds "compelling" enough to overcome a "strong presumption" -- that a particular § 310(b)(4) applicant or licensee presents national security or law enforcement problems in order for the Commission to deny, revoke, or condition a common carrier license on that basis. Instead, the FBI and other agencies with responsibility over national security and law enforcement will continue to advise the Commission when such concerns exist, and the Commission must continue to defer to the judgement of such agencies, in accordance with the November 1995 Order, the Harris letter, and longstanding practice under federal law.[3] The Final Order that emerges from this docket must

[3] The NPRM does not, and reasonably could not, contend that the GBT Agreement requires the Commission to cease according deference to executive agencies on national security and law enforcement matters. The Harris letter expressly disclaimed that such a result could occur: "[E]ven after an NGBT agreement, the Commission would prevent any foreign entity from buying more than a 25 percent indirect interest in a common carrier radio licensee if it is advised by the Executive Branch that there is a law enforcement or national security reason to do so." Similarly, United States Trade Representative Barshefsky has explained in correspondence to the Congress that the U.S. commitment in the GBT agreement obliges the United States to "place[ ] no new restrictions on indirect foreign ownership of a U.S. corporation holding a radio license" but allows the Commission to continue to subject § 310(b)(4) applications to public interest review as it has in the past. 143 Cong. Rec. S1945-01, S1962 (March 5, 1997) (emphasis added); id. at S. 1963. The FBI, of course, is not

reaffirm this approach, not the contrary approach suggested in the NPRM.

II. The Commission Must Review Any Increase in Foreign Ownership by a Licensee That Already Has More Than 25% Foreign Ownership

At paragraph 75 of the June 4, 1997 NPRM, the Commission solicits comment on "whether we need to review an increase in [indirect] foreign ownership [under § 310(b)(4)] by a licensee that already has more than 25 percent foreign ownership." The Commission acknowledges it must review applications that involve a "transfer of control" of a licensee, but asks "whether we need to review additional investments that do not effect a transfer of control." NPRM, ¶ 75.

The FBI believes the Commission must conduct a § 310(b)(4) public interest review concerning any increase in foreign ownership by a licensee that already has more than 25% foreign ownership, for two distinct reasons. First, and as the NPRM notes, the Commission must always review such an application when the increase in ownership would effect a transfer of control of a licensee. The only way to achieve this critical objective

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suggesting that the Commission impose <u>new</u> foreign ownership restrictions. Rather, we are pointing out the need to maintain the <u>existing</u> framework for handling the national security and law enforcement components of public interest analysis under § 310(b)(4).

<u>See also</u> June 4, 1997 NPRM, Separate Statement of Commission Chairman Reed Hundt (asserting that the Commission "will <u>retain</u> our <u>undiluted</u> authority to deny or condition such foreign carrier entry if the public interest so requires") (emphasis added). The "strong presumption" approach would certainly "dilute" the Commission's existing authority in this area.

consistently and with assurance is for the Commission (and the involved Executive Branch agencies) to review all increases in foreign ownership of licensees that are already more than 25% foreign-owned. Otherwise, the decision on whether to undertake a review would depend on an assessment of whether a particular increase in ownership (e.g., from 26% to 35%, or to 45%) effected a "transfer of control." We believe such assessments will often be impossible to make with certainty. Every transaction is different. In some instances, the increase might not yield a change in control until more than 50% of the licensee was foreign-owned. But in other cases, even a slight increase (e.g., from 26% to 30%) might be sufficient to effect a change in control if, for example, the domestic owners of the licensee could be expected to frequently vote their shares of the licensee in accordance with the wishes of a foreign owner. No bright-line percentage threshold can be identified to determine, for all situations, when a transfer in control has been effected.

Second, there likely will be instances where increases in foreign ownership from a level above 25% to a level that does not effect a change in control will present public interest concerns, including national security or law enforcement concerns. Such increases can be expected to result in greater foreign influence over the licensee, even if outright control is not achieved.

CONCLUSION

For the reasons set forth in Point I, the FBI disagrees with the NPRM's "tentative" conclusions concerning the manner in which national security and law enforcement equities are to be addressed by the Commission under § 310(b)(4). Any final order that emerges from the NPRM must reaffirm that the Commission will defer to the determinations of Executive Branch agencies on these matters. Moreover, as explained in Point II, we believe the Commission must review any increase in foreign ownership by a licensee that already has more than 25% foreign ownership.

Sincerely,

John F. Lewis, Jr.
Assistant Director in Charge
National Security Division
July 8, 1997

U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

May 24, 1995

A

Honorable John D. Dingell
House of Representatives
Washington, D.C.

Dear Congressman Dingell:

In response to your request, we would like to identify for you some serious concerns that the FBI and the DEA share about proposals to permit foreign ownership of telecommunications common carriers. The nature of these concerns is that vital U.S. law enforcement, intelligence, and national security interests have not been adequately addressed, even in the most recent proposals, and that there would be substantial and unacceptable risks to these interests. We would appreciate the opportunity to provide a classified briefing to the Committee about our concerns.

o Telecommunications networks are critical and unique parts of any nation's information infrastructure. They are the central conduits for transacting a great deal of governmental business and private commerce. Control of the networks has tremendous importance. Although U.S. law prohibits unauthorized interception of communications and disclosure of lawfully-authorized government electronic surveillance and record acquisitions, violations by a common carrier, as a practical matter, are undetectable. As was properly recognized over 60 years ago, common carrier licensing by the Federal Communications Commission is intended not just to ensure widespread and nondiscriminatory service at reasonable charges, but also "for the purpose of the national defense .. and of promoting safety of life and property." 47 U.S.C. 151. We continue to believe that national security and public safety considerations must be central to any modifications of our telecommunications laws.

o Even where the foreign corporation is privately-held, we believe that a foreign-based company could be susceptible to the influences and directives of its own

Honorable John D. Dingell

government. There are numerous examples of foreign companies being used and directed by their governments to carry out, or assist in carrying out, government intelligence efforts against the U.S. Government and/or major U.S. corporations.

Companies in many countries are culturally acclimated and thoroughly accustomed to carrying out such intelligence directives in ways and in degrees unheard of in the U.S. Unlike under U.S. law, where common carrier assistance is tied to court authorizations, foreign companies (including foreign common carriers) are much more subject to informal government influence. There is no reason to believe that such long-standing government influences would cease if such a company were licensed in the U.S. To the contrary, there is every reason to believe that this circumstance could lead to much greater and more pervasive foreign government influence in many instances.

Foreign governments could affirmatively task a foreign carrier to covertly intercept communications (or copy records) of U.S. Government agencies or major U.S. corporations (for purposes of stealing trade secrets, acquiring other proprietary information, or monitoring efforts to secure business internationally). Given a common carrier's central office intercept capabilities, such interceptions could be easily effected without detection.

o Of particular interest to many foreign governments would be U.S.-based efforts to conduct electronic surveillance regarding targets associated with that country. Such targets could be foreign intelligence officers, agents, or related entities. In addition, there are a number of countries where the target could be associated with criminal interests known to, and tolerated by, the foreign country (e.g., international drug-trafficking). In these instances, any time a U.S. law enforcement or counterintelligence agency sought to conduct electronic surveillance under Title III or FISA, or sought records concerning subjects associated with the foreign country, the foreign carrier may be approached by the foreign government to pass such information along to it. In turn, such information could be relayed to the targets thereby compromising important investigations. For example, U.S. law enforcement is aware of instances where a common carrier outside of the U.S. has been penetrated by the Cali drug cartel and highly sensitive information regarding contacts with local law enforcement has been used by the cartel to murder individuals thought to be cooperating with law enforcement.

- Operational control of common carrier records, data bases, line information, and central office facilities by a foreign-based company places sensitive governmental and private sector information in a fish bowl. Such immediate access lays wide open not only abundant amounts of information about U.S. law enforcement and intelligence targets, but also exposes sensitive information about government official's office and private home telecommunications service, personal data regarding them maintained in carriers' subscribers files, and line appearance information (indicating precisely where such official's phones could best be discretely tapped, assuming the company/employee chose to by-pass the handier central office access).

- A foreign-based company licensed as a carrier in the U.S. would immediately become privy to details of the current technological intercept capabilities and vulnerabilities of the U.S. law enforcement and intelligence agencies with regard to the services and features they offer. The acquisition of such information by the foreign country and its operatives could serve as a guide to how to avoid and evade U.S. surveillance. In fact, a listing of where such technological impediments (vulnerabilities) were recently found to exist was furnished to selected Congressional staffers in a classified report incidental to Congressional consideration of the Digital Telephony legislation last year.

- Under the Modified Final Judgment in the AT&T divestiture case, common carriers are required to comport with National Security Emergency Preparedness (NSEP) practices in order to immediately respond to U.S. Government telecommunications requirements when national emergency, disaster, or other critical government telecommunications needs arise. If a foreign-based carrier were called upon to immediately respond to some disaster such as an act of state-sponsored terrorism, there would be both doubt and risk to the government if the common carrier was influenced or otherwise controlled by a foreign government associated with such terrorism.

Honorable John D. Dingell

Law enforcement does not oppose greater global telecommunications competition or investment as such. Rather, we believe that as such initiatives are explored, vital U.S. law enforcement, intelligence, and national security interests must be seriously considered and properly resolved at the same time. Presumably, the goal of greater international business opportunities for foreign and U.S. carriers that is espoused by these proposals could be pursued without direct or indirect foreign corporate control over the operational, technical, and personnel aspects of the common carrier business which, as alluded to above, so readily and directly implicate vital domestic and national security interests.

Sincerely yours,

Louis J. Freeh
Director

Sincerely yours,

Thomas A. Constantine
Administrator

INTERNATIONAL BUREAU

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

(202) 418-0420
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April 24, 1996

B

Michael Vatis, Esq.
Associate Deputy Attorney General
U.S. Department of Justice
Room 4129
Washington, DC 20530

Dear Mike:

This is to confirm our discussion about how the Federal Communications Commission would expect to apply its public interest test to foreign ownership applications -- should the United States sign an NGBT agreement allowing 100 percent indirect foreign ownership of common carrier radio licenses. As I understand it, the Department of Justice was concerned that the Commission would be unable, if an NGBT agreement is signed, to refuse to issue licenses to foreign entities which pose a national security or law enforcement threat. We believe this concern is unwarranted.

As you know, the Commission has authority to prevent any foreign entity from acquiring an indirect interest in a common carrier radio licensee of more than 25 percent "in the public interest." The Commission has ruled that in considering such applications it will defer to the Executive Branch should it be advised that an applicant poses a law enforcement or national security problem. We would not anticipate changing the portion of our public interest test that mandates we defer to the Executive Branch on these issues.

We believe the broad language in our current rules, which allows us to deny an application on national security and law enforcement grounds, is entirely consistent with any obligation we would have under an NGBT agreement. In short, even after an NGBT agreement, the Commission would prevent any foreign entity from buying more than a 25 percent indirect interest in a common carrier radio licensee if it is advised by the Executive Branch that there is a law enforcement or national security reason to do so. Indeed, it is inconceivable that the FCC would issue a license to an entity that it has been advised by the Executive Branch would pose a law enforcement or national security risk.

We recognize that an applicant denied a license on such grounds could argue that our rules are inconsistent with NGBT commitments. It would not, however, be able to enforce any alleged NGBT commitment either at the Commission or on appeal to the courts. An applicant's rights under U.S. law are determined by our statutes and implementing rules. Instead, an aggrieved applicant's government could argue to the World Trade Organization that a Commission ruling denying a license was inconsistent with NGBT obligations. The U.S. government would, of course, oppose such an argument. But even assuming that the WTO agreed with the applicant's government, it would not have the right or ability to require that the Commission change its determination. Instead, the government of the applicant would merely have the right to take trade retaliation. In no case could we be required to license an entity that posed a national security or law enforcement risk.

I hope this is helpful. Please let me know if you need any additional information.

Sincerely yours,

Scott Harris

Scott Blake Harris
Bureau Chief